

1957

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Roger J. Traynor

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## Recommended Citation

Roger J. Traynor, *Unjustifiable Reliance*, 42 MINN. L. REV. 11 (1957).  
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# **UNJUSTIFIABLE RELIANCE**



ROGER J. TRAYNOR

REPRINTED FROM  
**MINNESOTA LAW REVIEW**  
VOL. 42, NO. 1



## UNJUSTIFIABLE RELIANCE\*

ROGER J. TRAYNOR\*\*

On such a delightful evening it is harrowing to know that one has been granted the power singlehanded to drown gayety with a speech. A profound distrust of words, including my own, impels me to reassure you that soon I shall be still again, soon enough so that you will forever be in doubt as to whether stilled speakers run deep. Perhaps you will give them the benefit of the doubt, as we do in California with those occasional brief visitations that are known elsewhere in the country as earthquakes.

This occasion is not one for solemn reminder of the high qualities and responsibilities of our profession. We have been told often enough, occasionally with the ironic inflection of Mark Anthony, that we are all learned and honorable men.

The question I should like to pose tonight is whether we are sufficiently unlearned for our times? Put your books aside for awhile; turn off the machinery of cases in your minds, and ponder the question against the recent years we have been living, in a world of wonders whose speeded-up hours rush through a minute-glass. Is it not a time to quicken the mind, to lighten its load of learning with questions on some of the tried but not necessarily true formulas we live by?

Not long ago I gained new perspective on how heavy our learning hangs in our heads from a somber little book published nearly a hundred years ago, called "The Laws and By-Laws of American Society."<sup>1</sup> Like our profession it was in dead earnest about its calling of regulating human relations. Solemnly it posed this problem:

"Every day the question is raised whether such and such a custom is adopted, received, and proper. At such a time there is a regret felt that there is not at hand, in one's own library, a safe guide, an experienced counsellor who will answer such questions, so trifling in appearance, so important in reality."

With ceremonious modesty, it stated its task as follows:

"It makes no claim to originality; but its aim is to be perfectly reliable. English, French, and American authorities of weight have been consulted, and nothing admitted that was not sanctioned by experience and the customs of the best society."<sup>2</sup>

Had a glass-bowl of a world then once existed that visibly pre-

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\*This address was delivered May 2, 1957, at the University of Minnesota Law School Banquet honoring Professor Henry Rottschaefer.

\*\*Associate Justice, Supreme Court of California.

1. Frost, *The Laws and By-Laws of American Society* (1869).

2. *Id.* at 3.

served the customs of the best society? The only society a judge reads about—and it is one he must take for better or worse—is a society of harried men and women labelled plaintiffs and defendants, who sometimes fight to the finish for property rights, and sometimes lightly surrender personal rights; whose frequent primitiveness shouts through the briefs and the transcripts of record more often than their nobility transcends them.

Turning the pages of the little book, I paused at the chapter on riding and driving. Riding and driving, the daily entry on the calendars of all our court. Would one find here in pristine state the law that judges are always supposed to be discovering? A pastoral version of the Hohfeldian categories? The bucolic precursor of *MacPherson v. Buick*?<sup>3</sup> Or perhaps a classically simple definition of the reasonable man—and some inkling of his legal relations to the reasonable woman?

Spellbound, I read this word-picture:

"Arrived at the house of his fair companion, the gentleman must carefully examine the entire furniture of her horse. He must test the firmness of the saddle and girths, examine well the stirrup-leather, guard against the danger of any buckle allowing a tongue of leather to slip, see that the curb, bridle, headstall and reins are in perfect order; for the entire control of the horse is lost if one of these breaks or slips. Leaving these matters to the stable-men entirely is unsafe, as the constant handling of the harness is apt to make them careless in fastening and testing it."<sup>4</sup>

Here was a reasonable man indeed. And there were no shades of *MacPherson v. Buick* to match him. Stable-men who constantly handle harnesses were expected to grow careless in fastening and testing them. The day had not yet dawned when they would be drilled on their strict duty of care.

It set one to dreaming. *MacPherson v. Buick* had transformed the careless stable-men into the most careful of men. What had the years done to the careful riders and drivers of yore?

A dreadful din shattered the reverie. Out of nowhere onto a screen appeared a young man, his arrival announced by sirens. He harangued us with fine words on our duty to Gross National Product. He bade every citizen to raise his standard of living yet another notch, to brace himself for three cars in every carport—one for himself, and one for his fair companion, and one for his fair children. A fleet of cars zoomed into sight, blazing with sharp-

3. *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

4. Frost, *op. cit. supra* note 1, at 95-96.



winged emblems poised for flight, populated with creatures whose faces were riddled with carelessness.

An arresting scene for laymen. A troubling one for lawyers who can envisage all too well the frequent aftermath, the screech and the crash and the lawsuits.

Little wonder that the trial courts cry help. Little wonder that the appellate courts echo them as they face the hopeless task of evolving rational solutions from such irrational rules as those on last clear chance, a thick sauce for the gelatinous standards of negligence established ad hoc by juries.

There is tragedy in our bland reliance that somehow the laws of yesteryear will halt the mounting destruction. It is time to stop this dreaming.<sup>5</sup> We must reckon now with the reality that an automobile on a highway is akin to a loaded gun in a crowd, and that its comparable destruction must be attended by comparable liability. We who reckon daily with the dreary waste of delay that attends overcrowded calendars plead with you to join for traffic laws that will compel at the least adequate insurance and a minimum capacity for driving, and will dare perhaps to propose a judicial process for the determination of injuries that will shift the emphasis from forensic theatrics to forensic medicine. If the courts cry wolf it is because the wolves are in the courtroom, making faces.

The day is gone when a gentleman, mindful that he could not rely on the enterprise of stable-men, inspected a horse himself and led it onto roads where he might meet a lady walking and stop to speak to her, taking care, according to our handbook on American Society, to "dismount until she bows and leaves him." Presumably with no honking at his back.

The day is gone when we can chant of the reasonable man as though he had existed from time immemorial, despite reminders to the contrary.<sup>6</sup> We have chanted our way to the nonsense of putting one man's unreasonableness beyond challenge by evidence that another was also unreasonable. We tend to think of the highway problem in the simplified terms of Driver A vs. Driver B. What if there are no survivors of an accident and no eyewitnesses? What of the situation where the charred remains of Driver A and five riders are discovered in the burned wreckage of his car in a canyon

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5. Justice Vanderbilt has forcefully directed attention to the fact that forensic medicine is now involved in ninety per cent of civil and criminal litigation. Vanderbilt, *Future of Legal Education*, 43 A.B.A.J. 207, 282 (1957). See also Halpern, *Medico-Legal Problems*, 17 U. Pitt. L. Rev. 57 (1955).

6. *Scheer v. Rockne Motors*, 68 F.2d 942, 944 (2d Cir. 1934).



deep down from a twisting mountain road at the angle called Dead Man's Curve?' On what rules of law can one justifiably rely to solve the problem of actual causation on a road that carries no warning of the tricks it can play on a driver's vision as he approaches the curve? Where are the rules of law to match the efficiency of the bulldozers that are daily churning up old fields for new highways that twist their way around mountains and across deserts and in and out of towns that will be alive with the bumper crop of babies that we are getting ready to welcome? To welcome and perhaps to kill?

The highway litigation that creaks along under ancient ways robs most of the time of the courts. It affords a ready excuse for inertia in other fields, that complacent repose that falsely masquerades as justifiable reliance on so-called settled law.

None of us would disturb the law that is truly and rationally settled. A courtroom is not a reform school or a laboratory for smashing the atoms of that accumulated wisdom called precedent. If the precedent works reasonably well most of the time, we do not throw it away in a hard case for a rule that might henceforth work badly most of the time. Yet we should examine old rules regularly, as a good workman examines the machines to which he is assigned, to see first if they are properly put together, and then if they are in good working order. As a judge, I shall be forever haunted by the first shock of learning that we cannot take either for granted, a shock that I recorded in a student note<sup>8</sup> on the rule in *Dumpor's* case.<sup>9</sup>

The opening sentence of that note was a declaration of shattered reliance:

"The extent to which courts sometimes blindly follow precedent is perhaps no more forcibly evidenced than by the history of the rule in *Dumpor's* case."<sup>10</sup>

The closing sentence was a declaration of independence:

"It was originally without foundation . . . [and still is]. If no law should survive the reasons upon which it is founded, surely it should not be perpetuated if it is founded on no reasons at all."<sup>11</sup>

You may recall that the landlord in *Dumpor's* case, by waiving once the tenant's covenant not to assign, unwittingly waived the

7. See *Gillespie v. City of Los Angeles*, 36 Cal. 2d 553, 225 P.2d 522 (1950).

8. 14 Calif. L. Rev. 328 (1926).

9. *Dumpor v. Symms*, 4 Coke Rep. 119b, 76 Eng. Rep. 1110 (1603).

10. 14 Calif. L. Rev. 328 (1926).

11. *Id.* at 333.

covenant as to successive assignments. Analyzing the rule every which way to ferret out some plausible ratio decidendi, one can only conclude that the court must have proceeded on some unarticulated notion that a waiver of the covenant runs with the land, though the covenant is deemed not to. One learns with the years that rules badly designed in 1603 may still be lively ghosts in 1957. Nevertheless their durability should not discourage a continuing challenge to their divinity.

Formulas are only words and words are not gods, as a modern case on slander well illustrates. As you all know, certain words can be slander per se. The pertinent case involved a defendant who had called a woman on board ship a *cocotte*. The court stated that

" 'Cocotte' is a French word meaning a woman who leads a fast life, one who gives herself up for money. The interpreter said it implies to some men the same idea as the word 'prostitution.' In other associations it may mean a poached egg. . . . If the word 'cocotte' in common usage is susceptible of two meanings, it would be for the jury to say in what sense the word was used and understood."<sup>12</sup>

In time these words found their way into textbooks to illustrate the law of defamation and the functions of judge and jury. Would that such a word could be so easily contained within bounds. The troublesome reality, however, is that it defies such containment. It means neither precisely a poached egg nor a prostitute. There is a phrase, *oeuf à la coque*, that means soft-boiled egg, and a word *coquetier* that means egg-cup, but by no process of *idem sonans* can these be equated with poached egg, which is *oeuf poché*. A jury could have quite a time unscrambling the eggs.

The word *cocotte* likewise defies containment within the alternative definition of prostitute. A prostitute in the blunt Anglo-Saxon sense, is a *prostituée*. There are dozens of earthier words that range the alphabet from B to T in the staid dictionary of the *Académie Française*.<sup>13</sup> *Cocotte* has not quite this harsh sense; it is a little cousin of the harsh word rather than an identical twin. It is usually defined as a *femme légère*, a light woman rather than a professionally bad one.<sup>14</sup> There would seem to be much less probability of a slanderous imputation from the light sense than from the harsh

12. *Rovira v. Boget*, 240 N.Y. 314, 316, 148 N.E. 534, 535 (1925).

13. *Dictionnaire de l'Académie Française*, Huitième Édition, Librairie Hachette (1931).

14. *Nouveau Petit Larousse Illustré*, 1956 ed. (Librairie Larousse; Robert, *Dictionnaire Alphabétique et Analogique de la Langue Française* Presses Universitaires de France (1951). See also Mansion, Heath, Cassell, or the Oxford French dictionary.

one. Some dictionaries translate the word as a woman of the demi-monde, suggesting the courtesan of the Victorian age. In our own non-Victorian day, when dowagers dance in chorus lines for charitable benefits, and the haut monde and demi-monde are indistinguishable in cafes or anywhere else, there is a world of difference between calling a woman on board ship a prostitute and calling her a light woman. The average listener might be quite at sea as to just what is involved in lightness. The term might itself be tossed off with enough lightness to carry no damaging nuance to a light woman and to convey perhaps to a ponderous one a flattery of sorts.

Actually *cocotte* is a household word of engaging variety. It can mean a cast-iron Dutch oven, such as you have in your kitchen. It may mean the little chicken you put into the Dutch oven. You will find it in standard French cook-books, such as the one that sets it forth after the verb "to clarify."<sup>15</sup> It could mean one of those folded paper caps that children make at birthday parties. It might mean an inflammation of the eyelids. It is a customary term of endearment for a child.

Such is the truth of the matter of an everyday French word. If one little word can have so many meanings should we not study other words a little more closely before we accept them as gospel? Should we not look to see if the alphabet soup is clear? We might do well to turn again to the cook-book and learn what it means to clarify. To clarify, it informs us, is to dissipate clouds by lighting slow fires beneath elements troubled with thickness.<sup>16</sup>

The elements of the law are words. The opening rite for students of law is to learn by rote the magic words that take their meaning from history. Many are magical still in the power of their reasoning, in their relevance to our own times. But some there are that have long been troubled with thickness. Our failure to light slow fires beneath them signifies not their sanctity but the depths of our own inertia.

Perhaps a handful of equity cases from one judge's workaday life, a shorthand selection from among many equally pertinent cases, will illustrate how that inertia serves to enshrine formulas. Take for example our cavelike retreat from a searching look at the Statute of Frauds. Few will quarrel with the historical premises of the Statute that honors certain transactions only if they are in writing.

15. Audran, *La Cuisine de Famille*, at 11 (1921).

16. *Ibid.* Our free translation renders imperfectly the frugal style and contained rhythm of the original. "*Clarifier: —C'est rendre limpides certaines substances troubles en les plaçant sur un feu doux.*" Literally: To render limpid certain turgid substances by placing them over a gentle fire.



When it was enacted, men of property were men of the land, over which still hung the long feudal shadow. We forget so easily, we who have a good chance of living beyond 60, that they had only some 30 years more or less to live and arrange their affairs before death. We forget so easily, we who are on the move to another home on an average of once every seven years and sometimes permanently on the move in a trailer, that the same parcel of land was the substance of their short lives, and those of their heirs forever. It was appropriate that transfers of land, once solemnized by livery of seisin, should thereafter be solemnized by a sealed writing scrolled out with a quill pen. We give hardly a passing thought to how relatively durable people have become, how relatively transient now is their relation to the land.

A few years ago in our state we confronted a situation wherein A conveyed real property to B in reliance on B's oral promise to hold in trust for A. In a context that suggested a confidential relationship, B broke the promise. We had to reckon with a line of cases that denied the remedy of a constructive trust because there was no actual fraud or no confidential relationship. We had to reckon with the curious duality in our legal thinking that enables us to see the actionable wrong of direct injury to another's property and disables us from visualizing the consequences of breaking a promise as to such property.

Our analysis, proceeding from that of scholars long preoccupied with this duality,<sup>17</sup> led us to the cases that afforded at least the remedy of specific restitution to those who had parted with purchase-money or rendered services in reliance on an unenforceable oral promise to convey real property. From there we advanced to the theory that one who himself conveys in reliance on an oral promise of another to hold in trust can invoke specific restitution to preclude the unjust enrichment of the other, when the latter's course of conduct has made plain his awareness that the property had been given him in trust.<sup>18</sup>

The Statute of Frauds can operate still more harshly in protecting one who breaks a promise to devise real property to another in exchange for the latter's services. Situations arise where an action for breach of contract or restitution in quantum meruit cannot make the plaintiff whole. An award of back pay would not be restoration to one who had prospected and developed a mine on the promise of a share thereof. Such ventures cannot be reduced

17. See 1 Scott, *Trusts* § 44, at 248 (2d ed. 1956) and authorities cited.

18. *Orella v. Johnson*, 38 Cal. 2d 693, 697, 242 P.2d 5, 7 (1952).

to hours and skills measurable by time and motion formulas; the one who thus engages himself has cut himself off from other opportunities that cannot be recaptured.

Our court faced this problem in *Monarco v. Lo Greco*.<sup>19</sup> In 1926 Christie Lo Greco, aged 18, decided to leave the home of his mother and stepfather, Carmela and Natale, and seek an independent living. They persuaded him, however, to stay with them and participate in a family farm enterprise, then worth \$4,000. They orally promised him that if he stayed home and worked, they would keep their property in joint tenancy so that it would pass to the survivor, who would leave it to Christie by will.

What happened thereafter is recorded in the opinion:

"Christie remained home and worked diligently in the family venture. He gave up any opportunity for further education or any chance to accumulate property of his own. He received only his room and board and spending money. When he married and suggested the possibility of securing some present interest to support his wife, Natale told him that his wife should move in with the family and that Christie need not worry, for he would receive all the property when Natale and Carmela died. . . . The venture was successful, so that at the time of Natale's death his and Carmela's interest was worth approximately \$100,000."<sup>20</sup>

Shortly before his death, however, Natale secretly arranged conveyances to terminate the joint tenancies and executed a will leaving all his property to a grandson in Colorado, who received the property after probate and brought an action for partition, relying on the Statute of Frauds to defeat enforcement of the oral promise on which Christie had relied in devoting his life to the farm for twenty years. The grandson argued that no assurance had been given Christie that he would be protected from the operation of the Statute of Frauds, and that therefore he should not be protected.

The court refused to let the grandson invoke the Statute. To do so, it reasoned, would result not only in unconscionable injury to Christie but in unjust enrichment to the grandson, who should no more than his ancestor Natale reap the rewards of Christie's labor. On this double basis the court imposed a constructive trust on the grandson, invoking the doctrine of equitable estoppel.

Thus in two cases involving broken promises, the court advanced to solutions that it reasoned out as appropriate to the problem in its modern context. In the first case it moved the property back to the rightful owner through the remedy of specific

19. 35 Cal. 2d 621, 220 P.2d 737 (1950).

20. *Monarco v. Lo Greco*, 35 Cal. 2d 621, 622, 220 P.2d 737, 739 (1950).

restitution; in the second, it moved the property forward to the rightful taker through the remedy of a constructive trust.

Another recurring problem in our State, as in others, was engendered by the formula that a purchaser of realty who defaults on a single instalment forfeits all his payments. For half a century that formula hovered in an atmosphere of acceptance. A few years ago we brought it down to earth for a close-up in a case involving a land-purchase contract stipulating that time was of the essence and that the buyers would face forfeiture for any default.<sup>21</sup> In 1941 the buyers made a down payment of \$700 on a house costing \$5,450. They made regular payments with 6% interest for 57 months. They made permanent improvements exceeding \$3,000. Then during an illness, two of their checks were dishonored. There was evidence that they were unaware of such dishonor until they received notice of forfeiture from the seller. They immediately tendered certified checks for the amounts due, but the seller refused them, insisting on a return of the property and a forfeiture of all that the buyers had paid.

We pondered the contractual phrase that time was of the essence. The glossy glibness it has acquired with soporific repetition did not deaden us to the fact that under the gloss, essence was a meaningful word. We were having word-trouble again: this time the difficulty was not that a versatile word was being erroneously reduced to two inexact meanings, but that it was cavalierly being used with no thought of its meaning at all. What kind of essence was it, and of what was it the essence?

We were on guard against the stupefying effect of the phrase. We deemed it essential to note that time is not made of the essence by mere declaration, when there is no showing of any hardship on a seller from the buyers' temporary default after fifty-seven months of faithful payment. We invoked a provision against forfeiture in the Civil Code,<sup>22</sup> ignored by a nineteenth-century case<sup>23</sup> that reached a probably just result on a misreading of another code section.<sup>24</sup>

The early case read into that other section, directed against forfeiture, a sometime sanction of forfeiture, generating an interpretation so curious as to prompt the despairing heading in the annotated code that it was "cited without particular application."<sup>25</sup>

We reread that old case, and not by gaslight. We then reread

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21. *Barkis v. Scott*, 34 Cal. 2d 116, 208 P.2d 367 (1949).

22. Cal. Civil Code, § 3275 (1954).

23. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713 (1898).

24. Cal. Civil Code, § 1492 (1954).

25. Annotations to Deering's Civil Code of Cal., § 1492 (1950).



Professor Corbin's searching analysis<sup>26</sup> of the land-contract cases, wherein he demonstrated that a literal acceptance of blundering judicial language, at odds with actual results, had long obscured the fact that forfeiture was no more justified by precedent than by reason. We analyzed the California precedents in the light of that study, verifying its soundness. And so we came to the decision that when the default is not serious and causes the vendor no damage and the vendee is willing and able to continue with his performance of the contract, relief against forfeiture will be granted, whether or not time is declared to be of the essence.

In this case we precluded forfeiture against an innocent purchaser willing to go ahead with the contract, and compelled specific performance by the seller. In the following year we permitted forfeiture of the down payment of a purchaser who had willfully breached his contract, to the seller's damage.<sup>27</sup> We took care, however, to distinguish the situation of a defaulting purchaser who could show that there was no damage to the seller, and could therefore claim restitution to preclude the seller's unjust enrichment.

There followed a troublesome case wherein we allowed restitution of the down payment of \$2,000, less expenses, to a purchaser who repudiated his contract to buy for \$18,000 upon a showing that the seller had promptly sold the land to another for \$20,000. We there noted the irrationality of the traditional view that enables a purchaser who breaches his contract before making any payment at all to escape penalty altogether, but tolerates forfeiture against a purchaser who has made partial payment.<sup>28</sup> The paradoxical consequence of such a view is that the greater the part performance, the greater is the penalty.

Our decision involved a reconciliation of several code sections, the total effect of which operated to preclude forfeiture that would unjustly enrich another. It marked an advance from the time when Professor Ballantine could write in the *Minnesota Law Review* that:

"The law, while looking with righteous abhorrence on forfeitures . . . yet has been reluctant to intervene with affirmative relief or to formulate any consistent principle condemning the validity of cut-throat provisions which . . . involve forfeiture. Although the law will not assist in the vivisection of the victim,

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26. Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid*, 40 Yale L. J. 1013, 1026 (1931).

27. *Baffa v. Johnson*, 35 Cal. 2d 36, 216 P.2d 13 (1950).

28. *Freedman v. The Rector*, 37 Cal. 2d 16, 230 P.2d 629 (1951).



it will often permit the creditor to keep his pound of flesh if he can carve it for himself."<sup>29</sup>

Elsewhere Professor Williston noted the wide acceptance of the carving formula.<sup>30</sup> In California, however, we can no longer rely on the law's tolerance of penalties that bear no rational relation to the injury. The wonder is that we unjustifiably relied on it for so long.

Even a judge preoccupied with the problem of reliance was ill-prepared for the day it presented itself in the form of a lurid triangle.<sup>31</sup> Like many another tall tale about California, the story of this triangle is true. There was the usual Jack and the usual Jill. The unusual third party, however, was a shop that sold mink coats.

These three managed to produce a merry-go-round of reliance dizzy enough to stagger the soberest judge. One early spring day Jack squired Jill into the shop, where she soon lost her heart to a handsome mink coat. The price, said the shop, was \$5,000. He'd buy it, said Jack, for four. Not a dime less than five, said the shop. Not a dime more than four, answered Jack. Faced with this impasse, Jill reckoned fast. After all, a whole mink coat is better than none. Out of Jack's hearing, she assured the shop she would chip in the difference, and persuaded it to sell to him ostensibly at his price. The ruse worked like a charm. He signed the saleslip, probably convinced he had won a hard bargain. The shop then delivered the coat to him. He promptly delivered to Jill, with appropriate words of gift.

The very next day she paid to the shop the difference in price, as she had agreed. She then left the coat to be monogrammed, that she might henceforth be clothed with the indicia of ownership. The shop was unaware that in the past twenty-four hours there had been grave damage to her delicate relationship with the donor. There is no known way of ringing such changes on saleslips.

Then the fur began to fly. Later in the day Jack stormed into the shop, declaring that he had revoked his gift, that the coat was his, and that he would pay the \$4,000 only if the shop delivered to him. This it refused to do. Thereafter Jill marched in demanding that it deliver the coat to her. When it again refused, offering instead to refund the \$1,000 she had paid, she sued for conversion. The shop then filed a curious "Cross-Complaint in Interpleader," demanding affirmative relief against either or both of the other sides

29. Ballantine, *Forfeiture for Breach of Contract*, 5 Minn. L. Rev. 329, 341 (1921).

30. 5 Williston, *Contracts* § 1473, at 4118 (rev. ed. 1938).

31. *Earl v. Saks & Co.*, 36 Cal. 2d 602, 226 P.2d 340 (1951).

of the triangle. It was willing to deliver to either, on assurance of payment in full, but it had to be one or the other. It wisely knew that neither Jack nor Jill would regard a divided mink coat as better than none.

As for itself, it preferred money to mink. When Jack sought to rescind the contract, it demanded enforcement of his promise to pay \$4,000 for a coat whose quality was not in dispute. It was a going concern, not a warehouse for mink returned by gentlemen customers. The law of contracts was at stake. The burning issue was whether a shop that had connived with a girl to expedite a sale to her escort could justifiably rely on its contract of sale with him.

The trial court refused to believe that but for the connivance he would not have bought the coat. His offer to pay no more than \$4,000 might well encourage a helpful girl to pave the way for him to pay just that and thus realize his dream of a hard bargain. It found it was not too likely that the spirit of giving a \$5,000 mink at a cost of \$4,000 would be extinguished by knowledge of the enterprising scheme that facilitated the execution of the gift.

Moreover, counsel at the trial made it clear that what troubled Jack was not Jill's connivance with the shop, but her alleged dalliance with others:

"[H]e told her in effect that if she wanted to reciprocate his affection and would give up running around with other men and give them a chance to see whether or not they might be able to mature their affection, he would be very pleased to give her suitable gifts, a token of his esteem and regard. . . . [O]n the very evening of this gift . . . [he] became confronted with the reality that the young lady wasn't telling him the truth about things, she wasn't keeping appointments and on the contrary was misleading him about her plans . . . and when that realization came upon him he felt that he wanted to interrupt the giving of the gift."<sup>32</sup>

Despite the trial court's findings, justifying enforcement of the sales contract between the shop and the purchaser, the plot grew thicker. On appeal, Jack sought a reversal, apparently on the theory that the shop was fraudulent in not advising him that he was getting more for his money than he had bargained for. A knowledgeable lamb had closed the gap between a bullish offer and his bearish counter-offer, making the latter acceptable. Plainly he did not rue his bargain with the shop until his friend allegedly broke whatever bargain she made with him in return for suitable tokens of esteem. Counsel suggested that she could not justifiably rely on mink as a

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32. *Id.* at 614, 226 P.2d at 348.

gift. There was a distinct implication that such a token of esteem could be reclaimed whenever the estimate proved wrong.

And once reclaimed, what to do with the mink? It was caught in a vicious triangle. Since Jack had wrongly appraised the future with Jill, he now retroactively evaluated the past transaction with the shop. He succeeded on appeal in persuading a majority of the court that he could justifiably rely on rescission as a remedy against the shop that had unbeknownst to him given him the best of a good bargain.

The contrary view I took has only the fleeting life of a dissent: "It was for the trial court to determine whether [he] was a man of such temperament that he would have preferred having [her] get along without the fur coat to accepting her contribution toward its purchase. He declared his love for her, expressing the sentiment several times that he wanted to give her a fur coat. She was 'very much in love with the coat and wanted it badly.' It was important to him that the woman he loved possess the coat; it was important to her to possess it. Her contribution enabled him to fulfill his wish and hers at a price he was willing to pay. Since they were both fur-coat minded, it is a reasonable inference that he would not have risked disturbing the relationship between them by depriving her of the coat because she was willing to contribute toward its purchase. Counsel at the trial made it clear that [he] sought rescission of the sale because [she] failed to live up to his expectations. This failure can in no way be attributed to Saks and Company. Its coat was of sound quality and came up to [her] expectations. The court properly rejected [his] offer of proof of his expectations and disappointment. Not only were they no concern of Saks and Company, but no issue was raised in the pleadings regarding his arrangements with [her]."<sup>33</sup>

Nevertheless even a dissenter can resign himself to the contrary majority opinion. The law's tolerance of sales promotion can be sorely tried by sales so deviously consummated.

You may well ask why a judge who would have abided by what he regarded as established contract law in this case departed from traditional formulas in the cases discussed earlier. The question merits a painstaking answer. Perhaps we can begin with a view I have elaborated elsewhere, that "The responsibility to keep the law straight is a high one. It should not be reduced to the mean task of keeping it straight and narrow."<sup>34</sup>

"The great mass of cases are decided within the confines of stare decisis. Yet there is a steady evolution, for it is not quite true

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33. *Id.* at 614, 226 P.2d at 347.

34. Traynor, *Some Open Questions on the Work of State Appellate Courts*, 24 U. Chi. L. Rev. 211, 219 (1957).



that there is nothing new under the sun ; rarely is a case identical with the ones that went before. Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values."<sup>35</sup>

It did not seem to this judge that in the *mink coat* case established contract law had lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.

In contrast, there had long been forewarnings in the other cases that all was not right with the conventional formulas. Scholars had already made devastating analyses of their irrational operation. Ancient cases, too frequently resting on a dogmatic view of the common-law or an actual misreading of the statutes, worked havoc with justice and became increasingly hard to justify as precedents. The splendid meaning of *stare decisis*, to stand by decided cases, the accepted connotation that we thus stand by the stabilized living law, were being distorted. In our inertia we were standing by ghosts as well as living law, unjustifiably relying on the formula that all decisions are created equal and deserve equally to survive. So at long last we set an occasional ghost at rest in the past to which it belonged, in the belief that however much the wisdom of the ages deserves to survive, the foibles of the ages do not.

The fast-changing world can ill afford to perpetuate the foibles of the past. Our law schools and professional associations are ably attacking unrealistic formulas, whose familiarity still breeds undeserved respect. But where is the infantry that will undertake the task of patient persuasion to convert splendid studies into working laws? We have accepted too long and too passively museum-piece laws, as anachronistic in our time as amulets and *asafetida* bags would be in medicine. We should take care lest a scribe emerge to render an account of us as Moliere did of the medical profession of his time. He might take more care than we do with words, and record with deadly precision the pretensions and ineptness of our unjustifiable reliance.

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35. Traynor, *Law and Social Change in a Democratic Society*, 1956 U. Ill. L. Forum 230, 232.